Supreme Court, U. S.
FILED
OCT 1 1979
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-542

JOHN DAVID HAY

Petitioner

--v.--

STATE OF TEXAS
(Board of Pardons and Parole)

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES. COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Suite 174
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(713) 784-0220

Petitioner Pro Se

September 21, 1979

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

JOHN DAVID HAY

Petitioner

--v.--

STATE OF TEXAS, et al
(Board of Pardons and Parole).

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The petitioner John David Hay, respectifully prays that a Writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 29, 1979.

Opinion Below

The opinion of the United States Court of Appeals appears in the Appendix hereto and is not yet reported.

The opinion of the United States District Court appears in the Appendix hereto and is not yet reported.

The opinion of the Court of Criminal Appeals for the State of Texas appears in the Appendix hereto and is not yet reported.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 29, 1979. This petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

Question Presented

Whether or not a "Not Guilty" verdict form, presented and signed by the duly elected Foreman of the Jury, to a presiding trial judge constitutes attachment of jeopardy?

Constitutional Amendments
Involved

U. S. Constitution, Fifth amendment -- in part: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

On January 30, 1978, an application for writ of Habeas Corpus was filed in the United States District Court for the Southern District of Texas. See: Hay v. Texas, 472 S.W.2d 157.(10/6/71)

This application was denied on May 23, 1978, without a hearing.

On May 23, 1978, Notice of Appeal was filed in the United States District Court for the Southern District of Texas.

On June 29, 1978 a certificate of probable cause was issued, and on July 31, 1978 all original papers in this matter were transferred to the United States Court of Appeals for the Fifth Circuit, New Orleans, La.

On June 29, 1979 the United States Court of Appeals for the Fifth Circuit affirmed the lower court's ruling.

REASON FOR GRANTING THE WRIT

1.

The Fifth Amendment to the United States Constitution provides, in part:

> "Nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb, nor shall he be a witness against himself, or be deprived of life, liberty or property without due process of law ---".

The petitioner in this instance case has been tried three (3) times, twice before a jury upon a plea of "not guilty" and once before the Court on a plea of "guilty".

At petitioner's initial trial in this cause, there were two (2) verdicts rendered,

the first being that of "not guilty", and the second, after instructions from the trial court, of "Guilty". The events surrounding the first verdict of "Not Guilty" have been the basis for the various appeals and Writ applications in this cause.

A review of these events can be found in the Original Trial Transcript, but for briefing they are as follows:

After instruction from the Court, the jury retired to consider the verdict. After deliberations, the jury returned to the courtroom. The court asked the jury if they had reached a verdict and the foreman of the jury stood and replied that they had, and handed the baliff the verdict form, whereupon the baliff handed the verdict form to the Court. At this point the Court stated, "Mr. Foreman, you have forgotten to sign the verdict form. Mr. Baliff, hand the charge to the foreman and let him sign it, (the charge was handed to the foreman of the jury and he signed the verdict). The foreman handed the verdict form to the baliff, and the baliff returned it to the Court. There was nothing said during this time to <u>anyone</u> in the courtroom.

The Court, after receiving the signed verdict form, stated: "Mr. Foreman, I believe you have done this wrong. Ladies and Gentlemen, go back to the jury room and consider your verdict and when you have done so, knock on the door and we will receive it".

After the jury had gone back to the jury room, petitioner's lawyer and the assistant district attorney representing the State of Texas approached the bench to determine what had happened.

Upon finding out that the Court had refused to accept the "Not Guilty" verdict, and had instructed the jury to go back into the jury room to reconsider their verdict, there ensued quite a heated argument for some few minutes. Thereafter the jury knocked on the door and was brought back into the courtroom. Again the foreman was asked if they had arrived at a verdict, and the foreman stated that they had and handed the verdict form to the baliff, who handed it to the Court, whereupon the Court read aloud the following:

> "---We the jury, find the defendant guilty of robbery by assault, as charged in the indictment, signed by the foreman. So say y'all ladies and gentlemen?" (whereupon the jury answered in the affirmative, that it is their verdict). See verdict form where original signature of the foreman of the jury on the "Not Guilty" line is scratched through, and has been signed on the "Guilty" line".

At this point, the Court, in a statement, into the record, tried to clean up his mistake. Also the jury was polled for the first time. Defendant's lawyer also asked for a mistrial at this time, but it was not granted.

The petitioner contends the following:

A. No person, for the same offense, shall be twice put in jeopardy --- (See U. S. Constitution Fifth Amendment; Texas Constitution Article 1 § 14, United States v. Jorn, 400 US 516. The cases are clear, that retrial may be had in cases where a mistrial was requested by defendant and granted by the court or where a conviction is reversed on defendants motion UNLESS

such action is provoked by improper acts of the court or prosecution. (See Bryan v. U. S., 338 US 552, and Foreman v. U.S., 361 US 416.

By no stretch of the imagination or judicial rhetoric can the first verdict of "Not Guilty" handed to the court in this case at bar, be considered informal, illegal, or improper form. In stating, "I believe you have done this wrong" the court in effect told the jury it should have returned a "Guilty" verdict, rather than a not guilty verdict. If this is not construed as coercion, then the word coercion has no meaning in judicial review. (See: Jenkins v. U.S. 85 S. Ct. 1059). A judgment of acquittal, whether it results from a jury verdict ordered by the court, or the jury's decision based on the merits of the case, bars further proceedings against the defendant as provided by the double jeopardy clause of the fifth Amendment, for the same offense (See Fong Foo v. U.S. 82 S. Ct. 671). To tell a jury that they have reached a "wrong" verdict, when there are only two possible verdicts on the verdict form is tantamount to an instructed verdict of guilty, and since the jury was instructed that their verdict was wrong, what other choice did they have but to return the second verdict of guilty, and subsequently to testify to that fact, when polled after the second verdict was read aloud in open court.

There should never have been an "Appeal to the Texas Court of Criminal Appeals in this instance case, nor any subsequent Habeas Corpus hearings. As this court stated in Downum, V. U.S., 372 US 734-738, any doubt should be resolved in favor of the liberty of the citizen, rather than exercising what would be an unlimited, uncertain and arbitrary Judicial discretion.

This petitioner has not only been "twice" put in jeopardy in this cause, but also meets the requisite of the Fifth Amendment to the U. S. Constitution as to having his constitutional rights that are guaranteed each and every citizen of the U. S. flagrantly violated. He has been compelled to be a witness against himself (ie: try spending over 5 years in a county jail and then being told "if you plead guilty, you will be allowed to go to the penitentiary where you will be eligible for parole).

Petitioner has been deprived of liberty (ie. sent to prison) and deprived of property (ie. all petitioner's money went to lawyers, except for this writ (he has no money left to hire an attorney to file this application). Petitioner can be thankful that he has not been deprived of his life, although being in jail and prison with hardcore criminal elements is tantamount to taking one's life into one's own hands.

Although the Fifth Circuit's affirmation of this cause is without written opinion, petitioner was present at oral arguments on June 18, 1979. Since one of the Circuit Judges referred to Jones v. Estelle, 538 F 2d 651 (1976), it is obvious this is the basis of their affirmation. Petitioner will readily agree that the trial judge in that cause was solely directed at dispelling confusion in the verdict returned and did not show any inquiry that could be taken to constitute coercion of the jury's verdict. This petitioner believes the above case differs from his in that the record clearly shows the trial judges statements, in petitioner's case, constituted coercion of the jury's verdict. (See U.S. v. Edwards, 469 F 2d 1362 and U.S. v. Sexton, 456 F 2d 961).

This petitioner has searched for 10 years to try and find a similar case as his, but to no avail. There is no case which this petitioner can find where a criminal trial judge refused to accept a "Not Guilty" verdict from the jury, and sent them back to the jury-room to reconsider their verdict. There has never been a fact finding hearing on this matter that was conducted by anyone except the original trial judge, but even these records reflect that the Original trial Judge did not know why he thought the "not guilty" verdict was the "wrong" verdict. He just states that he felt that the jury foreman signed on the wrong form inadvertantly. He never had a conversation with the foreman of the jury, nor did he poll the jury until they had returned with the "Second" verdict, that one being guilty.

Petitioner would like to express to this court his apology for the form of this writ application. He is not schooled in law, and his limited knowledge of the law comes from working on this case for 10 years. Petitioner also feels that this court should send this cause back to District Court for a full evidentiary hearing, so that all the facts and events surrounding the "First Verdict" in this case be brought out. In the alternative, petitioner would ask this Court to have sent to it the <u>complete records</u>, of this case. The Fifth Circuit Court of Appeals has sent them back to District Court Judge Singleton for the Southern District of Texas.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the United States Court for the Fifth Circuit.

Respectfully submitted,

JOHN DAVID HAY

8401 Westheimer
Suite 174
Houston, Texas 77063

(713) 784-0220

Petitioner Pro Se

September 21, 1979

APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-3543

JOHN DAVID HAY

Petitioner-Appellant.

versus

STATE OF TEXAS (BOARD
OF PARDONS AND PAROLE).

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(JUNE 29, 1979)

Before: GOLDBERG, FAY AND RUBIN, Circuit Judges

PER CURIAM: Affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN DAVID HAY, Petitioner STATE OF TEXAS (BOARD OF PARDONS AND PAROLE), Respondent	CIVIL ACTION H-78-526

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this court that this action should be and is hereby DISMISSED.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 23rd day of May 1978.

Judge John V. Singleton
UNITED STATES DISTRICT JUDGE

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas ..... OCT 6 1976 .....

Dear Sir:

This is to advise that the Court has denied without written order the application for writ of habeas corpus
.....
.....
in Application No. ..3645....., John David Hay .....

Sincerely yours,

GLENN HAYNES, Clerk

Constitutional Amendments Involved

U. S. Constitution, Fifth Amendment -- in part: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property without due process of Law.

Texas Constitution, Article 1 § 14--- in part:
"No person, for the same offense shall be twice put in jeopardy for life or liberty, nor shall a person be again put on trial for the same offense after a verdict of not guilty in a court of competant jurisdictions".

If you find the defendant guilty, use this form of verdict:)

We, the Jury, find the defendant guilty of Robbery by Assault as charged in the Indictment.

FOREMAN.

If you find the defendant not guilty, use this form of verdict:)

We, the Jury, find the defendant not guilty.

FOREMAN.

Certificate of Service

I, John David Hay, petitioner Pro Se, do hereby certify that three true copies of the above and foregoing application for writ of Certiorari have been deposited in the United States mail, postage prepaid. Certified on this the 25 Day of September, 1979 to the following address:

MR. MARK WHITE
Attorney General of Texas

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Att'n: Gilbert J. Pena
Assistant Attorney General
Respondent

John David Hay
Petitioner Pro Se

Supreme Court, U. S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979

* * *

NO. 79-542

* * *

JOHN DAVID HAY,

Petitioner

V.

TEXAS BOARD OF PARDONS AND PAROLES,

Respondent

* * *

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

MARK WHITE
Attorney General of Texas

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979

* * *

NO. 79-542

* * *

JOHN DAVID HAY,

Petitioner

V.

TEXAS BOARD OF PARDONS AND PAROLES,

Respondent

* * *

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the Texas Board of Pardons and Paroles, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits this Brief in Opposition:

OPINIONS BELOW

In denying Petitioner's application for habeas corpus relief, the district court adopted the United States Magistrate's Memorandum and Recommendation. The Order entered by the district court and the

Memorandum and Recommendation of the United States Magistrate are set forth as Appendix A to Respondent's Brief in Opposition. The district court's decision was affirmed per curiam without a written decision by the United States Court of Appeals for the Fifth Circuit on June 29, 1979, and appears in the Appendix to the Petition for Writ of Certiorari at A-1.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1254. The Petition, however, was not filed until October 1, 1979, more than ninety (90) days after the June 29, 1979, decision of the Court of Appeals for the Fifth Circuit of which Petitioner seeks review. Thus, the Petition is untimely under 28 U.S.C. §2101(c).

QUESTION PRESENTED

Respondent believes that the only issue presented to this Court for review may be stated as follows:

I. Whether Petitioner was acquitted by the jury in his first trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the Fifth Amendment of the United States Constitution. Respondent cites 28 U.S.C. §1254 and 28 U.S.C. §2101(c).

STATEMENT OF THE CASE

The Memorandum and Recommendation of the United States Magistrate, adopted by the district court, adequately and correctly states the essential facts in this case.

> "Petitioner, convicted in the Criminal District Court for Dallas County, Texas, filed this action pursuant to 28 U.S.C. §2254. He

> contends that the criminal proceedings initiated against him by the state constituted 'double jeopardy'. The facts, as set out by Petitioner, are as follows:
>
> At Petitioner's initial trial on robbery charges, upon presentation of the verdict, the trial judge pointed out to the foreman of the jury that the foreman had neglected to sign the verdict. The foreman then took the verdict form and signed the verdict under the 'Not Guilty' portion of the document. Upon examining the signed verdict, the trial judge stated, 'Mr. Foreman, I believe you have done this wrong. [G]o back into the jury room and consider your verdict, and when you have done so, knock on the door and we will receive it.' When the jury returned, the judge accepted the verdict which was now signed on the 'Guilty' portion of the form. The same jury assessed punishment at one-hundred years in the Texas Department of Corrections. Petitioner appealed and the Texas Court of Criminal Appeals reversed and remanded the case. *See Hays v. Texas*, 472 S.W.2d 157 (Tex.Crim.App. 1971). In a subsequent proceeding, Petitioner entered a plea of guilty to the same robbery charge for which he was originally tried.
>
> Petitioner now contends that the action of the jury in his first trial constituted an acquittal, and therefore, when the state chose to retry Petitioner, he was subject to double jeopardy. After an evidentiary hearing on the matter, the state courts denied Petitioner's application for habeas relief. Petitioner has provided this Court with a transcript of the state evidentiary hearing.
>
> Evidence adduced at the state habeas

hearing indicated that when the jury in the original trial was polled, all jurors acknowledged that there had been a mistake when the foreman signed the 'Not Guilty' verdict. The jurors indicated that they were unanimously agreed on Petitioner's guilt. Evidence also showed that the foreman was flustered and acting in a hasty manner when the judge returned the verdict to him for signing. Also admitted into evidence was the record of a prior hearing at which two of the jurors had testified. Both of these individuals agreed that on the first ballot all jurors had voted Petitioner guilty, and that no juror had ever voted not guilty. They had also testified that the action of the court in returning them to the jury room had not influenced their decision concerning the guilt of the Petitioner.

In his findings of fact, the judge presiding over the habeas hearing found that the jury foreman, in the first instance, inadvertently signed the wrong portion of the form, that the jury never intended to acquit the defendant, and that, in fact, the jury did not return a verdict of not guilty. In effect, the judge found as a matter of fact that when the foreman initially signed the verdict, it was merely a mistake on the part of the foreman in signing that portion of the form that indicated a finding of not guilty.

These findings of fact, based upon the evidence adduced at the state hearing, are presumed to be correct in the present federal habeas corpus proceeding. Petitioner alleges none of those circumstances set out under 28 U.S.C. §2254(d) which would destroy such a presumption."

Hay v. State of Texas (Board of Pardons and Paroles), Civil Action No. H-78-526, Memorandum and Recommendation of May 23, 1978, at 1-2 (S.D.Tex., May 23, 1978); A. 3-5.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO FILE HIS APPLICATION FOR WRIT OF CERTIORARI IN A TIMELY FASHION.

28 U.S.C. §2101(c) provides that "[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." The judgment of which Petitioner seeks review was entered on June 29, 1979. The ninetieth day expired on September 27, 1979. Petitioner's Petition for Writ of Certiorari was not filed in this action until October 1, 1979. Thus, his application was untimely and this Court should not consider the petition.[1]

II.

PETITIONER HAS FAILED TO PRESENT WITH ACCURACY, BREVITY AND CLEARNESS THE FACTS ESSENTIAL TO CONSIDERATION OF THE ISSUES PRESENTED.

---

[1] §2101(c) provides that "[a] Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." Petitioner has never requested an extension of time or offered any explanation for his failure to file his petition in a timely fashion. To the contrary, he erroneously asserts that "[t]his Petition was filed within 90 days of that date [June 29, 1979]." (Petition, at 2).

In the present case, Petitioner asks the Court to consider "whether or not a 'not guilty' verdict form, presented and signed by the duly elected Foreman of the Jury to a presiding trial judge constitutes attachment of jeopardy?" (Petition, at 2). Petitioner seeks to interpose the bar of double jeopardy to his present conviction. In doing so, however, Petitioner has failed to present this Court with an accurate statement of "all the circumstances of the proceedings" which resulted in the erroneously signed "Not Guilty" verdict form. As this Court has repeatedly recognized, the determination whether the conclusion of one proceeding bars litigation of a later proceeding in essentially a pragmatic one turning on whether the jury in fact found petitioner not guilty. *See Ashe v. Johnson*, 397 U.S. 436 (1970); *Turner v. Arkansas*, 407 U.S. 366 (1972); *Harris v. Washington*, 404 U.S. 551 (1971). Petitioner has failed to apprise the Court of the pertinent facts surrounding the signing of the not guilty verdict form. Among the pertinent facts which Petitioner fails to mention were those adduced at a state habeas corpus hearing on March 10, 1972.

> "At the hearing on 10 March 1972 the State adduced the testimony of two jurors of the first trial. Such jurors testified that when the jury first retired they read the court's charge, elected a foreman, briefly discussed a few points of the evidence, and then took a paper ballot vote. Both jurors agreed that on this first ballot that all of the jurors voted petitioner guilty. After the jury returned to the courtroom the court pointed out that the verdict forms page was not signed, the foreman hastedily signed the form, and the court pointed out that he believed the wrong form had been signed and returned the jury to the jury room. The jurors further testified that once they returned to the room the foreman admitted he had signed the wrong form, scratched out his name on the 'Not Guilty' line and placed his signature on the 'Guilty' line. The jurors both testified that no juror had ever voted 'not guilty' and that the action of the court in returning them to the jury room had not influenced their decision concerning the guilt of petitioner."

Ex parte John David Hay, Writ. No. 264-L, slip op. at 3-4; B. 3-4 (Crim.Dist.Ct. No. 5, August 28, 1975) (attached as Appendix B).

By failing to supply the Court with the foregoing facts Petitioner has deprived the Court of the information necessary for the double jeopardy inquiry. Under the rules of this Court "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." Rule 23(4), Rules of the Supreme Court. In view of Petitioner's egregious failure to fully inform the Court, denial of his petition is appropriate.

III.

WHETHER THE JURY IN PETITIONER'S FIRST TRIAL INTENDED TO ENTER A VERDICT OF NOT GUILTY IS ESSENTIALLY A FACTUAL QUESTION UNWORTHY OF THIS COURT'S ATTENTION.

In essence, Petitioner argues that a procedural error in correcting the clerical error in the signing of the verdict form constitutes a judgment of acquittal. Clearly, this is an untenable position. The word "acquittal" possesses no talismanic quality for the purposes of the double jeopardy clause. An acquittal cannot be divorced from the procedural context in which the action so characterized was taken. *Serfass v. United States*, 420 U.S. 377, 392 (1975). The substance of

the action taken, not merely the form, must be examined to determine if such an action was an acquittal within the meaning of the double jeopardy clause. When ambiguity exists, it is necessary to look to the intent of the trier of fact. The determination whether the conclusion of one proceeding bars litigation of a later proceeding is essentially a pragmatic one turning on whether the jury in fact found Petitioner not guilty. *See Ashe v. Swenson, supra; Turner v. Arkansas, supra.* The Court must " 'examine the record of a prior proceeding...' the inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceeding.' " *Ashe v. Swenson*, 397 U.S. at 1194.

Both the state district court and the United States district court have conducted a thorough inquiry into the factual circumstances giving rise to the foreman's signature on the not guilty form. Both concluded that a review of all the circumstances of the proceedings in this case demonstrates that the jury in fact found Petitioner guilty. It is apparent from his petition that Petitioner disagrees with the factual conclusions of the lower courts.

Clearly such a factual dispute does not justify exercise of this Court's certiorari jurisdiction. The state trial court on a state application for habeas corpus, the Texas Court of Criminal Appeals, the United States District Court on a federal application for habeas corpus, and the Fifth Circuit Court of Appeals found facts sufficient to support a finding that the jury in Petitioner's initial trial intended throughout the proceeding to find Petitioner guilty. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Lindy Co.*, 336 U.S. 271, 275 (1949). The Petitioner, who asks this Court to correct alleged errors

in the fact findings by not two, but four, lower courts, has failed to make the required exceptional showing of error. The reason is that such a showing is impossible. The record in this action fully supports the conclusion of the courts below. The only issue before the Court "is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction..." *Tacon v. Arizona*, 410 U.S. 351, 353 (1973). In the instant case, Respondent submits that the Writ of Certiorari should not be granted.

CONCLUSION

For the reasons state above, Petitioner has failed to present facts indicating that a review of his contentions is needed and, therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

NANCY M. SIMONSON
Assistant Attorney General

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(512) 475-3281

Attorneys for Respondent

PROOF OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, and a member of the bar of this Court, do hereby certify that a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, on this the ___ day of December, 1979, addressed as follows:

Mr. John David Hay
8401 Westheimer, Suite 174
Houston, Texas 77063

DOUGLAS M. BECKER
Assistant Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DAVID HAY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-78-526
	§	
THE STATE OF TEXAS (BOARD OF PARDONS AND PAROLES),	§	
	§	
Respondent.	§	

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 23rd day of May, 1978.

s/s
JOHN V. SINGLETON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DAVID HAY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-78-526
	§	
THE STATE OF TEXAS (BOARD OF PARDONS AND PAROLES),	§	
	§	
Respondent.	§	

ORDER

For the reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on April 28, 1978, it is ORDERED that said Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED that Respondent's Motion to Transfer be denied, and that Petitioner's cause be dismissed for failure to state a claim upon which relief may be granted.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 23rd day of May, 1978.

s/s
JOHN V. SINGLETON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DAVID HAY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-78-526
	§	
THE STATE OF TEXAS (BOARD OF PARDONS AND PAROLES),	§	
	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner, convicted in the Criminal District Court for Dallas County, Texas, filed this action pursuant to 28 U.S.C. §2254. He contends that the criminal proceedings initiated against him by the state constituted "double jeopardy". The facts, as set out by Petitioner, are as follows:

At Petitioner's initial trial on robbery charges, upon presentation of the verdict, the trial judge pointed out to the foreman of the jury that the foreman had neglected to sign the verdict. The foreman then took the verdict form and signed the verdict under the "Not Guilty" portion of the document. Upon examining the signed verdict, the trial judge stated, "Mr. Foreman, I believe you have done this wrong. [G]o back into the jury room and consider your verdict, and when you have done so, knock on the door and we will receive it." When the jury returned, the judge accepted the verdict which was now signed on the "Guilty" portion of the form. The same jury assessed punishment at one-hundred years in the Texas Department of Corrections. Petitioner appealed and the Texas Court of Criminal Appeals reversed and

remanded the case. *See Hay v. Texas*, 472 S.W.2d 157 (Tex. Crim. App. 1971). In a subsequent proceeding, Petitioner entered a plea of guilty to the same robbery charge for which he was originally tried.

Petitioner now contends that the action of the jury in his first trial constituted an acquittal, and therefore, when the state chose to retry Petitioner, he was subject to double jeopardy. After an evidentiary hearing on the matter, the state courts denied Petitioner's application for habeas relief. Petitioner has provided this Court with a transcript of the state evidentiary hearing.

Evidence adduced at the state habeas hearing indicated that when the jury in the original trial was polled, all jurors acknowledged that there had been a mistake when the foreman signed the "Not Guilty" verdict. The jurors indicated that they were unanimously agreed on Petitioner's guilt. Evidence also showed that the foreman was flustered and acting in a hasty manner when the judge returned the verdict to him for signing. Also admitted into evidence was the record of a prior hearing at which two of the jurors had testified. Both of these individuals agreed that on the first ballot all jurors had voted Petitioner guilty, and that no juror had ever voted not guilty. They had also testified that the action of the court in returning them to the jury room had not influenced their decision concerning the guilt of the Petitioner.

In his findings of fact, the judge presiding over the habeas hearing found that the jury foreman, in the first instance, inadvertently signed the wrong portion of the form, that the jury never intended to acquit the defendant, and that, in fact, the jury did not return a verdict of not guilty. In effect, the judge found as a matter of fact that when the foreman initially signed the verdict, it was merely a mistake on the part of the foreman in signing that portion of the form that indicated a finding of not guilty.

These findings of fact, based upon the evidence adduced at the state hearing, are presumed to be correct in the present federal habeas corpus proceeding. Petitioner alleges none of those circumstances set out under 28 U.S.C. §2254(d) which would destroy such a presumption.

Taking the facts set out in the transcript of the evidentiary hearing as true, the verdict rendered at the close of Petitioner's trial cannot be construed as an "acquittal". The word "acquittal" has no talismanic quality for purposes of the double jeopardy clause. "Acquittal" cannot be divorced from the procedural context in which the action so characterized was taken. *Serfass v. United States*, 420 U.S. 377, 392 (1975). The substance of the action taken in the trial court, not merely the label attached to the action, must be examined to determine if such action was an acquittal and, hence, whether a claim of double jeopardy is properly asserted. *United States v. Lasater*, 535 F.2d 1041, 1047 (8th Cir. 1976). When ambiguity exists as to whether there has in fact been an acquittal, it is proper to look to the intent of the trier of fact. *See United States v. Taylor*, 544 F.2d 347, 349 (8th Cir. 1976). Examining the facts as they exist on the record of the present case, it is clear that the jury did not intend to render a verdict of "not guilty".

Any irregularity in the verdict or prejudice resulting from the conduct of the trial judge was remedied when the Texas Court of Criminal Appeals reversed and remanded Petitioner's case. Retrial after Petitioner's successful appeal, it should also be noted, did not constitute double jeopardy nor did it in any way bar a second trial. *Jeffers v. United States*, ___U.S.___, S.Ct. 2207, 2217 (1977).

While Respondent in the case at bar has moved to transfer this case to the Northern District of Texas, the Magistrate finds that such a transfer would not further

the interests of justice. With the need for an evidentiary hearing obviated by Petitioner's submission of the state court records in this case, Petitioner's choice of venue in the Southern District should control. Under 28 U.S.C. §2241(d), the Southern District, as the district in which Petitioner, now on parole, is in constructive custody, has concurrent jurisdiction with the Northern District to entertain Petitioner's application for habeas relief. Accordingly, Respondent's Motion to Transfer should be denied.

From the above, it appears that Petitioner fails to state a claim upon which this Court may grant relief. Though Respondent has failed to file a motion to dismiss, the Magistrate believes that under the circumstances present in the case at bar, dismissal of this action on the Court's initiative is appropriate. *See* 28 U.S.C. §2243; Rule 4 of the Rules Governing §2254 Cases in the United States District Courts (1977); *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970).

For the foregoing reasons, the Magistrate recommends that Respondent's Motion to Transfer be denied, and that Petitioner's cause be dismissed for failure to state a claim upon which relief may be granted.

DONE at Houston, Texas, this 28th day of April, 1978.

s/s
NORMAN W. BLACK
UNITED STATES
MAGISTRATE

APPENDIX B

WRIT NO. 264-L

EX PARTE	)	IN CRIMINAL DISTRICT
	)	COURT NO. 5 OF
	)	DALLAS COUNTY, TEXAS
JOHN DAVID HAY	)	APRIL TERM, A.D. 1976

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of Petitioner's Application for Writ of Habeas Corpus, all other pleadings in the case, the evidence adduced at a hearing held thereon and the official records of this Court, the Court makes the following Findings of Fact and Conclusions of Law.

I.

Petitioner was convicted of the felony offense of robbery by assault in Cause C69-535-L in Criminal District Court No. 5 of Dallas County, Texas, in a jury trial on 9 and 10 September 1969. Punishment was assessed by the jury at 100 years confinement in the Texas Department of Corrections. On appeal the cause was reversed and remanded. *Hay v. State*, 472 S.W.2d 157 (Ct.Crim.App. 1971, reh.den.).

On 30 and 31 October 1972 Petitioner was again tried in the same cause before a jury on his plea of not guilty. Again, a jury found Petitioner guilty and assessed his punishment at 45 years, T.D.C. Petitioner's motion for new trial was granted.

On 27 August 1973 Petitioner was tried a third time in the same cause. Petitioner changed his plea to guilty and, after being duly admonished, was assessed a sentence of 20 years confinement in the Texas Department of Corrections. Petitioner did not appeal this conviction.

II

Petitioner filed this writ after his release from the Texas Department of Corrections on parole.

III

Petitioner alleges that his conviction in Cause C69-535-L is invalid because the trial court was without jurisdiction to try Petitioner again following the reversal of his case on appeal. Petitioner contends that when the jury foreman in the first trial signed the "not guilty" verdict form that even though all the jurors acknowledged, upon being polled, that this was a mistake and that they were unanimously agreed upon Petitioner's guilt, that the trial court had to accept the "not guilty" verdict and pronounce judgment upon it. Further, that once the Court of Criminal Appeals determined that the conduct of the trial judge was improperly suggestive to the jury then the cause should have been reversed and dismissed rather than remanded since the subsequent trial constituted double jeopardy.

IV

The Court finds the above allegation to be without merit, in fact and in law, for the following reasons:

a. The trial court did not improperly influence the jury foreman in the first trial. All the credible evidence shows that the foreman of the jury became flustered when the court pointed out that the verdict form was unsigned and hurriedly signed the first signature blank he saw on the form without reading the form (T., Writ Hearing, p. 17). See also the appellate record of the first and second trials on file with the Court of Criminal Appeals.

b. Although the procedure and language of the trial court, in correcting what was to the court an obvious

error was not that recommended by the appellate court, such procedure was not deliberately calculated to deny Petitioner a fair trial. The error of the judge was error in the same sense that commenting on the evidence would be in another case.

c. There is no talismanic effect caused by the foreman's signature on the verdict form. The foreman's signature is to the effect that the jury has unanimously agreed that a defendant is guilty or not guilty. If the jury was unanimously agreed that a defendant was not guilty but the foreman signed the guilty form, would that make the defendant guilty? The Court thinks not. Art. 37.04, V.A.C.C.P., by its procedure recognizes that errors may occur. See Art. 37.05, V.A.C.C.P. and Art. 37.10, V.A.C.C.P.

d. Between the first and second trials Petitioner filed what the Court treated as an application for writ of habeas corpus (trial court's writ 92-L), which writ raised the same questions as this instant application. A hearing of such prior application was conducted on 10 March 1972, and the record of that hearing was admitted as evidence on the instant writ application with the approval of counsel for Petitioner and the State (T. Writ. Hearing, p. 2).

At the hearing on 10 March 1972 the State adduced the testimony of two jurors of the first trial. Such jurors testified that when the jury first retired they read the court's charge, elected a foreman, briefly discussed a few points of the evidence, and then took a paper ballot vote. Both jurors agreed that on this first ballot that all of the jurors voted Petitioner guilty. After the jury returned to the courtroom the court pointed out that the verdict forms page was not signed, the foreman hastedly signed the form, and the court pointed out that he believed the wrong form had been signed and returned the jury to the jury room. The jurors further testified that once they were returned to the room the foreman

admitted he had signed the wrong form, scratched out his name on the "not guilty" line and placed his signature on the "guilty" line. The jurors both testified that no juror had ever voted "not guilty" and that the action of the court in returning them to the jury room had not influenced their decision concerning the guilt of Petitioner.

Unfortunately, this testimony was not available to the Court of Criminal Appeals, causing that court to place the worse possible interpretation on the action of the trial court because of a "cold" record. The Appellate Court was not in the position of the trial court and could not see the obvious flustered behavior of the foreman when his mistake was pointed out or how he signed the verdict form without reading or consideration.

The Court finds that there was never a jury verdict by the first trial jury of "not guilty" and the procedure used by the Court, while technically wrong, had no influence on the jury.

V

The Court finds that the Petitioner has not been denied any rights guaranteed to him by the Constitution of the United States or the Constitution of Texas.

VI

The Court finds that the Petitioner is lawfully restrained and confined by Respondent.

VII

The Court is of the opinion that the Petitioner's Application for Writ of Habeas Corpus is totally without merit and recommends that the same be denied.

ORDER

IT IS, THEREFORE, ORDERED, ADJUDGED and

DECREED by the Court that a hearing on Petitioner's Application for Writ of Habeas Corpus should be and is hereby refused and denied in all things.

The Clerk of this Court is hereby directed to prepare a transcript of all proceedings had in this case, including this Order and all pleadings filed herein, and transmit the same forthwith to the Clerk of the Court of Criminal Appeals of Texas.

s/s
ED GOSSETT
JUDGE
CRIMINAL DISTRICT COURT
NO. 5
DALLAS COUNTY, TEXAS